

## **SETTLEMENT AGREEMENT**

### **1. INTRODUCTION**

#### **1.1 The Parties**

This Settlement Agreement is hereby entered into by and between Evelyn Wimberley and BJ Products Inc (hereinafter “BJ” or “ProducerBJ”), with Wimberley and BJ collectively referred to as the “Parties” and each of them as a “Party.” Wimberley is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. BJ is a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

#### **1.2 Allegations and Representations**

(a) Wimberley alleges that BJ has manufactured, caused to be manufactured, distributed and/or offered for sale in the State of California, El Diablo Mesquite Charcoal, that when used as intended produces combustion byproducts carbon monoxide and/or soot, and that such sales have not been accompanied by Proposition 65 warnings. Carbon monoxide is listed under Proposition 65 as a chemical known to the State of California to cause reproductive harm and soot is listed as a chemical known to the State of California to cause cancer. Wimberley has cited UPC086526400005 as a specific example of the El Diablo Mesquite Charcoal that is the subject of her allegations.

(b) For purposes of this Settlement Agreement only, BJ represents that:

- 1) UPC086526400005 is marketed as El Diablo Mesquite Charcoal manufactured by BJ and distributed to Wal-Mart Stores, Inc. (“Walmart”) and others; and
- 2) ProducerBJs had no reason to believe that the item allegedly required warnings under Prop 65 for carbon monoxide and/or soot until receiving Wimberley’s Notice dated May 22, 2017.

(c) ProducersBJ’s denies the material, factual and legal allegations contained in the Notice, and maintains that all products sold, distributed or offered for sale in California have been and are in compliance with all laws, including, without limitation, Proposition 65.

(d) The Parties enter into this Settlement Agreement pursuant to a full and final settlement of any and all claims between the Parties and to resolve all Proposition 65 claims concerning ProducerBJ's products set forth in Wimberley's Notice, including claims against ProducerBJ's customers, including Walmart who received the Notice alleging violations of Proposition 65 resulting from their distribution and/or sale of ProducerBJ's products in California.

### **1.3 Covered Items**

The products that are covered by this Settlement Agreement are defined as El Diablo Mesquite Charcoal UPC086526400005. All such El Diablo Mesquite Charcoal shall be referred to herein as the "Products."

### **1.4 Notice of Violation**

On or about May 22, 2017 Wimberley served Producers, Walmart, and all public enforcement agencies eligible to initiate Proposition 65 actions on behalf of the People of the State of California with a document entitled "60-Day Notice of Violation" (the "Notice") that provided Producer, Walmart, and such public enforcers with notice that alleged that Producer and Walmart were in alleged violation of Proposition 65 for failing to warn consumers and customers that the Products exposed users in California to carbon monoxide and soot. No public enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus service time relative to the provision of the Notice to them by Wimberley.

### **1.5 No Admission**

The material allegations contained in Wimberley's Notice are denied. ProducerBJ and Walmart maintain they have not violated Proposition 65. Nothing in this Settlement Agreement shall be construed as an admission by ProducerBJ or Walmart of any fact, finding, issue of law, or violation of law, including without limitation, denying any admission concerning any violation of Proposition 65 or any other statutory, regulatory, common law, or equitable doctrine, and/or denying any admission as to the meaning of the terms "knowingly and intentionally expose" or "clear and reasonable warning" as used in Health and Safety Code section 25249.6.

Nor shall compliance with this Settlement Agreement constitute or be construed as an admission by ProducerBJ of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Producer. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Producer under this Settlement Agreement.

## **1.6     Execution Date**

1.6.1   For purposes of this Settlement Agreement, the term “Execution Date” shall mean the date this Settlement Agreement is fully executed.

1.6.2   For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date that Prop 65 warnings shall be implemented pursuant to Article 2.

## **2.     COMPLIANCE**

**2.1     Warning Options.** The Products shall be deemed to comply with Proposition 65 with regard to carbon monoxide and/or soot if the Products from which exposures to Carbon monoxide and soot are alleged are labeled with the following: “**California Proposition 65 Warning:** Combustion (burning) of this product produces chemicals, including carbon monoxide and/or soot, known by the State of California to cause cancer, birth defects or reproductive harm.” **Alternatively**, Producer may use the regulatory safe harbor warning in compliance with Proposition 65 under the most recent Proposition 65 regulations.

**2.2**     For Products manufactured after 60 days of the Execution Date, the warning provided pursuant to Section 2.1 shall be prominently displayed on the Covered Product with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual prior to sale. (“Effective Date”). If other warnings are given, the warning shall be contained in the same section that states other safety warnings concerning the use of the product and shall be at minimum the size mandated by the Proposition 65 regulations and at least the same size as those other safety warnings.

## **3.     REIMBURSEMENT OF FEES AND COSTS**

3.1 The Parties reached an accord on the compensation due to Wimberley and her counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, ProducersBJ shall reimburse Wimberley’s counsel for fees and costs, incurred as

a result of investigating, bringing this matter to ProducersBJ's attention, and negotiating a settlement in the public interest. ProducersBJ shall pay Wimberley's counsel \$20,000.00 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice. ProducerBJs shall provide said monies via bank wire to the "Law Offices of Stephen Ure, PC" (tax identification number 42-1641673) no later than July 28, 2017. The Law Offices of Stephen Ure, PC will provide ProducerBJs with tax identification and bank wire information prior to the Execution Date. Other than the payment required hereunder, each side is to bear its own attorneys' fees and costs.

3.2 Time is of the essence with regard to the receipt of payments specified in Article 3. If payments are not made as agreed this agreement shall, in its entirety, be null and void.

#### **4. CLAIMS COVERED AND RELEASED**

##### **4.1 Release of ProducerBJs and Downstream Customers**

Wimberley, on behalf of herself, releases Producers and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not limited to, Walmart, Walmart.com USA LLC and any of their respective parents, affiliates and subsidiaries), franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities (collectively "Releasees") from all claims for violations of Proposition 65 up through the Effective Date based on exposure to carbon monoxide and/or soot from the Products as set forth in her Notice of Violation. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to Carbon monoxide and soot from the Products.

In addition to the foregoing, Wimberley, on behalf of herself, her past and current agents, representatives, attorneys, and successors and/or assignees, and not in her representative capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases any other Claims that she could make against Producers or its Releasees arising up to the Effective Date, in any way related to the Notice, the facts alleged in the Notice,

any alleged violation of Proposition 65, and/or any alleged violation of any statutory or common law relating to the alleged failure to warn about exposure to carbon monoxide and/or soot with respect to the Products, and by virtue of the provisions of section 1542 of the California Civil Code, which provides as follows:

*A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.*

Wimberley understands and acknowledges that the significance and consequence of this waiver of California Civil Code section 1542 is that even if Wimberley suffers future damages or claims arising out of or resulting from, or related directly or indirectly to, in whole or in part, claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about alleged exposure to carbon monoxide and/or soot from the Products, Wimberley will not be able to make any claim for those damages or injunctive relief against the Releasees. Furthermore, Wimberley acknowledges that she intends these consequences for any such claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about alleged exposure to carbon monoxide and/or soot from Products as may exist as of the date of this release but which Wimberley does not know exist, and which, if known, would materially affect her decision to enter into this settlement, regardless of whether her lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

#### **4.2 BJ's Release of Wimberley**

ProducersBJ waive any and all claims against Wimberley, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Wimberley and her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products on behalf of itself, its past and current agents,

representatives, attorneys, and successors and/or assignees, and provides the same release on behalf of the other Releasees to Wimberley, their past and current agents, representatives, attorneys, and successors. ProducerBJ and Releasees waive all rights to institute or participate in, directly or indirectly, any form of legal action and releases any other Claims that they could make against Wimberley arising up to the Effective Date. By virtue of the provisions of section 1542 of the California Civil Code, which provides as follows:

*A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.*

ProducerBJ understands and acknowledges that the significance and consequence of this waiver of California Civil Code section 1542 is that even if ProducerBJ and Releasees suffer future damages or claims arising out of or resulting from, or related directly or indirectly to, in whole or in part, for any and all actions taken or statements made (or those that could have been taken or made) by Wimberley and her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products or any other statutory or common law, ProducerBJ and Releasees will not be able to make any claim for damages or injunctive relief against Wimberley. Furthermore, ProducerBJ and Releasees acknowledge that they intend these consequences for any and all such claims arising from Proposition 65 enforcement or any other statutory or common law remedies that may exist as of the date of the Release but which ProducerBJ does not know exist, and which if known, would materially affect their decision to enter into this settlement, regardless of whether their lack of knowledge is the result of ignorance, oversight, error, negligence or any other issue.

## **5. SEVERABILITY AND MERGER**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this document are held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

This Settlement Agreement contains the sole and entire agreement of the Parties and any and all prior negotiations and understandings related hereto shall be deemed to have been merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

## **6. GOVERNING LAW**

6.1 This Settlement Agreement shall be interpreted in accordance with the plain English meaning of its terms and the construction thereof shall be governed by the laws in force in the State of California, USA without regard to conflicts of law principles and Producers hereby irrevocably consent to personal jurisdiction and exclusive venue in San Diego Superior Court to resolve any disputes hereunder; and hereby appointing the pertinent Secretary of State or other applicable government authority as agent for receiving service of process. This Settlement Agreement resolves any issue, now or in the future, with the requirements of Proposition 65 with respect to alleged exposures to carbon monoxide and/or soot arising from the Products. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then ProducersBJ shall provide written notice to Wimberley of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

6.2 This Settlement Agreement shall apply to and be binding upon Wimberley and Producers, its divisions, subdivisions, and subsidiaries, if any, and the Parties' successors and assigns.

6.3 The Parties, including their counsel, have participated in the preparation of this Settlement Agreement and this Settlement Agreement is the result of the joint efforts of the Parties. This Settlement Agreement was subject to revision and modification by the Parties and

has been accepted and approved as to its final form by all Parties and their counsel.

Accordingly, any uncertainty or ambiguity existing in this Settlement Agreement shall not be interpreted against any Party as a result of the manner of the preparation of this Settlement Agreement.

**7. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any Party by the other Party at the following addresses:

For BJ Products Inc:  
Mr. Rudy Gibson, Owner  
3147 N. 31<sup>st</sup> Ave  
Phoenix, AZ 85017

and

For Wimberley:

Stephen Ure  
Law Offices of Stephen Ure, PC.  
11622 El Camino Real, Suite 100  
San Diego, California 92130

Any Party, from time to time, may specify in writing to the other Party a change of address to which all notices and other communications shall be sent.

**8. COUNTERPARTS; FACSIMILE SIGNATURES**

The stipulations to this Settlement Agreement may be executed in counterparts and by means of facsimile and/or portable document format (pdf), which taken together shall be deemed to constitute one document

**9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Wimberley agrees to comply with the requirements set forth in California Health & Safety Code §25249.7(f).

**10. MODIFICATION**



This Settlement Agreement may be modified only by further stipulation of the Parties and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

**11. ENFORCEMENT OF SETTLEMENT AGREEMENT**

Either Party may bring an action to enforce the terms of this Settlement Agreement. A Party who unsuccessfully brings or contests an action arising out of this Settlement Agreement shall be required to pay the prevailing Party's reasonable attorney's fees and costs unless the unsuccessful Party has acted with substantial justification. For purposes of this Settlement Agreement, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

**12. REPORTED SALES**

12.1 **ProducersBJ** represent and warrant that it believes that the maximum number of Covered Products shipped to Walmart for sale in California during 2016-2017 was 2900 units.

12.2 **ACCURACY OF SALES DATA**

ProducersBJ understand that the sales data provided to counsel for Wimberley by Producers was a material factor upon which Wimberley has relied to determine the amount of payments made under this Agreement. Producers represent that it has provided true and accurate sales data to plaintiff to the best of its ability.

**13. ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Settlement Agreement have been made by any Party hereto. No supplementation, modification, waiver, or termination of this Settlement Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Settlement Agreement shall be deemed or shall constitute a waiver of any of

the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

**14. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document.

**APPROVED AS TO FORM:**

Dated: July 24, 2017

\_\_\_\_\_  
By: Rudy Gibson  
BJ Products Inc

Dated: July 24, 2017

LAW OFFICES OF STEPHEN URE, PC

By: \_\_\_\_\_  
Stephen Ure  
Attorneys for Plaintiff,  
EVELYN WIMBERLEY

**AGREED TO:**

Date: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_  
EVELYN WIMBERLEY

By: \_\_\_\_\_  
RUDY GIBSON

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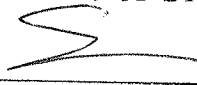
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Dated: July 24, 2017

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By: Rudy Gibson  
BJ Products Inc

Dated: July 24, 2017

LAW OFFICES OF STEPHEN URE, PC

By: \_\_\_\_\_  
Stephen Ure  
Attorneys for Plaintiff,  
EVELYN WIMBERLEY

**AGREED TO:**

Date: July 24, 2017

Date: \_\_\_\_\_

By: \_\_\_\_\_  
EVELYN WIMBERLEY

By: \_\_\_\_\_  
RUDY GIBSON

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Dated: July 24, 2017

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By: Rudy Gibson  
BJ Products Inc

LAW OFFICES OF STEPHEN URE, PC


By: \_\_\_\_\_  
Stephen Ure  
Attorneys for Plaintiff,  
EVELYN WIMBERLEY

**AGREED TO:**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
EVELYN WIMBERLEY

Date: 7/24/17

  
By: \_\_\_\_\_  
RUDY GIBSON